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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 66

JEREMIAH REEVES, JR.,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

N WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE PETITIONER

PETER A. HALL
ORZELL BILLINGSLEY, JR.
Counsel for Petitioner

TABLE OF CONTENTS

SUBJECT INDEX

Page

BRIEF FOR THE PETITIONER

Opinion Below 1

Jurisdiction 1

Questions Presented 2

Statutes Involved 4, 5, 6

Constitution of the United States—14th Amendment 4

Title 18 U.S.C. Section 243 4

Ala. Const. of 1901 Section 169 4

Title 15, Code of Ala. Section 320 (1940) 4

Constitution of the United States—Sixth Amendment 5

Title 15, Code of Ala. Section 278 (1940) 5

Title 15, Code of Ala. Section 279 (1940) 6

Title 15, Code of Ala. Section 286 (1940) 6

Title 30, Code of Ala. Section 86 (1940) 6

Statement 7

I. Events Which Preceded the Trial 7

II. Preliminary Motions 9

A. Motion for Permission to Withdraw Pleas Entered on Original Arraignment 9

B. Motion to Quash Indictment 9

C. Motion to Quash Indictment 10

D. Motion to Quash Venire 10

E. Refiling of Motion and Selection of Jury 14

Page

III. Testimony at the Trial 15

A. Commission of the Offense and Identification of the Accused 15

B. Inculpatory Statements and Confession: Testimony by Prosecutrix and Witness Clark 16

C. Petitioner's Defense 17

Argument 18

I-A. Due process of law guaranteed by the Fourteenth Amendment to the United States Constitution was denied to petitioner, by refusal of the trial Court to re-indict and re-arraign petitioner, or allow him to withdraw pleas entered on arraignment in order to attack his indictment on constitutional grounds 18

II. The Conclusion of the Supreme Court of Alabama that petitioner failed to prove systematic exclusion of Negroes from jury service solely because of race or color is incorrect 24

III. By upholding the trial court's denial of a public trial and refusal to declare a mistrial after the State prosecutor had made prejudicial statements in the presence of the venire from which the jury was selected, the court below denied petitioner his constitutional rights to a fair and impartial trial, and is in probable conflict with decisions of this Court 28

Conclusion 31

TABLE OF CASES CITED

Page

Avery v. *Georgia*, 345 U.S. 559, 73 S.Ct. 891 24
Canty v. *Alabama*, 309 U.S. 629, 60 S.Ct. 612 18
Cassell v. *Texas*, 339 U.S. 463 ..... 24, 25, 27
Chambers v. *State of Florida*, 309 U.S. 227 18
Hernandez v. *Texas*, 347 U.S. 475, 74 S.Ct. 667 ..... 24, 26
Hill v. *State*, 20 Ala. App. 197, 101 So. 298 ..... 18, 21
Hill v. *Texas*, 316 U.S. 400, 402 25
In Re Oliver, 68 S.Ct. 499, 333 U.S. 257 ..... 28, 30
Jeremiah Reeves, Jr. v. *State of Alabama*, 348 U.S. 891, 75 S.Ct. 214 ..... 8, 18, 21
Michel v. *Louisiana*, 100 L.Ed. 114, 76 S.Ct. 158 ..... 18, 22
Palko v. *Connecticut*, 302 U.S. 319, 325 30
Patton v. *State of Mississippi*, 332 U.S. 463 24
Reece v. *State of Georgia*, 350 U.S. 76, 76 S.Ct. 167 ..... 18, 23
Reeves v. *State*, 68 So. (2d) 14 ..... 7, 8
Vernon v. *Alabama*, 313 U.S. 547, 61 S.Ct. 1092 18
William v. *Georgia*, 349 U.S. 375, 75 S.Ct. 814 ..... 24, 27

Constitution:

United States Constitution Amendment 14 ..... 18, 21, 24

Statutes:

Title 15, 1940 Code of Alabama Sections 278, 279 & 286 19
Title 30, 1940 Code of Alabama, Section 86 ..... 18, 21
Title 18 U.S.C. Section 243 24

Other Authorities:

24 C.J.S. page 1128, Paragraph 1951 ..... 18, 21
50 C.J.S. pages 976-977, Paragraph 299 28

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Supreme Court of Alabama (R. 469) is reported at 88 So.2d 561.

Jurisdiction

The judgment of the Circuit Court for Montgomery County was affirmed by the Supreme Court of Alabama on June 21, 1956. Time for filing petition for Certiorari was extended to and including November 17, 1956, by order of Mr. Justice Black dated September 4, 1956. Petition for writ of certiorari and motion for leave to proceed *in forma pauperis* were granted on January 14, 1957. The printed record was received by petitioner's counsel on October 17, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3), petitioner having asserted in the courts below rights, privileges and immunities conferred by the Constitution of the United States.

Questions Presented

I

A. Whether a conviction for rape can stand where defendant has been tried and convicted once, and such conviction has been reversed by this Honorable Court, *per curiam,* without directions, unless defendant is reindicted and rearraigned.

B. Whether a conviction of a Negro for rape of a white woman which was founded upon an indictment obtained by the use of involuntary confessions or inculpatory statements was properly affirmed where a previous conviction founded upon such indictment has been reversed by this Honorable Court.

C. Whether petitioner was denied right guaranteed him by the Fourteenth Amendment to the United States Constitution where on his second trial for rape, the trial Court refused to allow him to withdraw pleas previously entered before his first trial, in order that he might attack his indictment on constitutional grounds.

II

A. Whether the Fourteenth Amendment is violated when petitioner is tried and convicted by a jury assembled from an array where the undisputed facts establish that Negroes have comprised from 0% to at best 10% on any venire in a County where they constitute more than 40% of the total population, and where the jury commissioners obtained the names of veniremen principally from personal acquaintances, clubs and other organizations, but knew few Negroes and virtually no Negro clubs or organizations.

B. Whether petitioner was denied his right to an impartial trial under conditions required by the Fourteenth Amendment where on qualifying the jury, the court asked each venireman about membership in the National Association for the Advancement of Colored People, at the insistence of the State Solicitor, who stated in the presence of the entire venire, that he had heard that such association was financing petitioner's defense.

III

A. Whether petitioner was denied his right to a public trial under the Fourteenth Amendment where the public is excluded from the courtroom during the trial.

Statutes Involved

Constitution of the United States
14th Amendment.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 18 U.S.C. Section 243.

Exclusion of jurors on account of race or color. No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000. (June 25, 1948, c. 645, Section 1, 62 Stat. 696.)

Ala. Const. of 1901 Section 169.

In all prosecutions for rape and assault with intent to ravish, the court may, in its discretion, exclude from the courtroom all persons, except such as may be necessary in the conduct of the trial.

Title 15, Code of Ala. Section 320 (1940).

Exclusion of public when evidence vulgar, etc. In all prosecutions for rape and assault with intent to ravish,

the court may, in its discretion, exclude from the courtroom all persons, except such as may be necessary in the conduct of the trial; and in all other cases where the evidence is vulgar, obscene, or relates to the improper acts of the sexes, and tends to debauch the morals of the young, the presiding judge shall have the right, by and with the consent and agreement of the defendant, in his discretion, and on his own motion, or on the motion of the plaintiffs or defendants, or their attorneys, to hear and try the said cause after clearing the courtroom of all or any portion of the audience whose presence is not necessary.

Constitution of the United States
Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 15, Code of Ala. Section 278 (1940).

Objections to indictments; how taken.—No objection to an indictment on any ground going to the formation of the grand jury which found the same can be taken to the indictment, except by plea in abatement to the indictment; and no objection can be taken to an indictment by plea in abatement except upon the ground that the grand jurors who found the indictment were not drawn by the officer designated by law to draw the same; and neither this objection, nor any other, can be taken to the formation of special grand jury summoned by the direction of the court.

Title 15, Code of Ala. Section 279 (1940).

Plea in abatement; when filed. Any plea in abatement to an indictment must be filed at the first session at which the indictment was found, if the accused has been arrested, or if the accused has not been arrested, such plea in abatement must be filed at the first session at which it is practicable after the defendant has been arrested and in all cases such plea in abatement must be filed before the plea to the merits.

Title 15, Code of Ala. Section 286 (1940).

When such plea filed, if sustained, new indictment preferred; limitation of prosecution. A plea to an indictment, on the ground that the grand jurors by whom it was found were not drawn in the presence of the officers designated by law, must if accused has been arrested be filed at the session at which the indictment is found, and if accused has not been arrested, it must be filed at the first session at which it is practicable after defendant's arrest; and in all cases before a plea to the merits; if sustained, the defendant must not be discharged, but must be held in custody or bailed, as the case may be, to answer another indictment at the same or the next session of the court; and the time elapsing between the first and second indictment, in such case, must not be computed as a part of the period limited by law for the prosecution of the offense.

Title 30, Code of Ala. Section 86 (1940).

Legal evidence only received before grand jury. In the investigation of a charge for any indictable offense, the grand jury can receive no other evidence than is given by witnesses before them, or furnished by legal documentary evidence; and any witness may be examined and compelled

to testify as to any offense within his knowledge, without being specially interrogated as to any particular person, time, or place.

Statement

This is petitioner's second trial for the same offense. On the first trial defendant was found guilty of rape and sentenced to death by electrocution, which judgment and sentence was affirmed by the Supreme Court of Alabama (*Reeves* v. *State*, 68 So. (2d) 14).

This Honorable Court granted certiorari and on the hearing reversed the State Court, *per curiam*, without opinion or directions (*Reeves* v. *State*, 348 U.S. 891). On the second trial petitioner was again found guilty of rape by the trial court and sentenced to death by electrocution (R. 466, 467). The Supreme Court of Alabama has affirmed (R. 469-478).

I. Events Which Preceded the Trial

On July 28, 1952, some time around noon, Mrs. Mable Ann Crowder, a 22 year old white woman, was raped in her home in the City of Montgomery, Alabama, by an unknown assailant (R. 228-234). Petitioner, a 16 year old Negro boy, was arrested on Monday, November 10, 1952, by two Montgomery County Sheriff's deputies (R. 396), taken to the County jail situated in the City of Montgomery, Alabama, where he was kept 5 or 6 minutes, and then taken immediately to Kilby Prison, a state penitentiary situated in this same County, where he was put in the "death cell", questioned, and threatened, without advice of counsel, and not allowed to see his parents from Monday, November 10, until the afternoon of Thursday, November 14, after he had made certain admissions or inculpatory statements, when his mother was allowed to see him (R. 397-400).

On Thursday, November 14, 1952, petitioner was indicted for the rape of Mrs. Mable Ann Crowder (R. 1) and was arraigned on November 15, 1952, his motion for continuance being overruled (R. 1-2), trial date was set as November 26, 1952 (R. 2). He then pleaded not guilty, and not guilty by reason of insanity (R. 2). Subsequently, on November 26, 1952, petitioner was tried in the Circuit Court of Montgomery County, Alabama, under and pursuant to the aforesaid indictment, and was convicted and sentenced to death in the electric chair (R. 20-22). The judgment and sentence of the trial court was affirmed by the Supreme Court of Alabama (*Reeves* v. *State*, 68 So. (2d) 14) (R. 469-478). This Honorable Court granted certiorari and after a hearing reversed the State Supreme Court *per curiam*, without directions. *Reeves* v. *State*, 348 U.S. 891, 75 S.Ct. 214 (R. 469).

On Monday, the 16th day of May, 1955, the Montgomery County Court met "pursuant to adjournment", and on motion of the Solicitor May 30, 1955, was set as date for petitioner's second trial.[1] On Monday, May 30, 1955, petitioner was again brought to trial in the Circuit Court of Montgomery County, Alabama, for the aforesaid offense without having been re-indicted or re-arraigned (R. 3).

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[1] The Court met "pursuant to adjournment" of the original case. The Court's Order recites " . . . and it appears to the Court that on a former day of this Court, November 15, 1952, the said defendant was duly arraigned and charged upon the indictment and pleaded thereto not guilty, and not guilty by reason of insanity; and on motion of the solicitor for the State, it is considered and ordered by the Court that the 30th day of May, 1955 be and the same is hereby appointed as the day for the trial of this cause." Nothing is said about the first trial or its disposition or remandment of the cause (R. 2-3).

II. Preliminary Motions

A. *Motion for Permission to Withdraw Pleas Entered on Original Arraignment.*

Before the jury had been selected and sworn, petitioner filed a written motion for permission to withdraw pleas entered on his arraignment in 1952 for the purpose of allowing his present attorneys the opportunity to attack the indictment on United States constitutional grounds (Def. Ex. 1, R. 37). The trial court overruled this motion (R. 39), and was sustained on appeal by the Alabama Supreme Court (R. 470-471).[2]

B. *Motion to Quash Indictment.*

Petitioner offered a written motion to quash the indictment returned on November 14, 1952 on grounds that Negroes were excluded from service on grand juries solely because of their race or color, thus violating rights guaranteed him by the Fourteenth Amendment to the United States Constitution; and asked the Court to set said motion down for hearing in order that petitioner might prove his contention (Def. Ex. 2, R. 42). The State's demurrer to this motion was sustained (R. 42-43).[3] On appeal the State Supreme Court sustained the trial court's ruling (R. 470).

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[2] The Supreme Court of Alabama, in considering the point, held "... on this trial of the case the appellant sought to withdraw his pleas of not guilty and not guilty by reason of insanity, which were entered on arraignment in order to permit him to attack the indictment on the ground of systematic exclusion of Negroes on the Grand Jury. The defendant was represented by counsel at the time the pleas were filed. The competency of counsel then representing defendant is not questioned. We find no error in the Court's refusal to allow the aforesaid pleas to be withdrawn ..." (R. 470).

[3] The State demurred to the motion and moved to strike same on the grounds, "... said motion was filed in this court after a plea to the merits answered in this case and, therefore, under Title 15, Section 278 and 279, comes too late ..." (R. 42).

C. *Motion to Quash Indictment.*

Petitioner filed a written motion to quash the indictment on the grounds that said indictment was based upon an alleged confession of guilt, obtained through coercion, force and violence, while defendant was illegally held at Kilby Prison, and that the said confession was the sole basis for the said indictment, and that a conviction of defendant in the Circuit Court of Montgomery County, Alabama, which had been affirmed by the Supreme Court of Alabama, had been reversed by the United States Supreme Court on constitutional grounds without directions remanding said cause for further trial, and asking the court to take judicial knowledge of the said facts and pointing out further that petitioner was being tried again for the same offense without being re-indicted or re-arraigned, and alleging that a valid indictment has not been returned against him, and that he was thereby being deprived of rights guaranteed him by the Fourteenth Amendment to the United States Constitution (Def. Ex. 6, R. 206-207). The Court denied this motion without a hearing (R. 207).

D. *Motion to Quash Venire.*

Petitioner moved to quash the venire of regular and special jurors called to try this cause on grounds that although, according to the 17th Decennial Census of the population of the United States, its territories and possessions for the year 1950 showed that the white male population of Montgomery County, Alabama, twenty-one years old and over, numbered 25,021, and that the Negro male population in said age group numbered 15,123, that Negroes were discriminated against in the selection of juries, and that the present jury was drawn and selected according to this practice (Def. Ex. 3 R. 44).

On the hearing of this motion it appeared that the authority for making a list of prospective jurors, or a jury roll, for Montgomery County, Alabama, and filling the jury box, rested in a Board of Jury Supervisors which was composed of the two Circuit Judges, the Probate Judge, the Sheriff of the County, and the Clerk of the Circuit Court (R. 65-66). Although the members of the Board denied racial discrimination in getting up the roll or filling the box, their testimony indicated a vast difference in methods of selecting white and colored jurors. Judge Eugene Carter, a Circuit Judge for 21 years, and a member of the Board of Jury Supervisors called as a witness for petitioner, testified that lists of prospective jurors were gotten from miscellaneous persons (R. 62), and from clubs (R. 56). He refused to identify his sources for Negro jurors because it might be embarrassing to them (R. 60). He testified further that he had charged practically all of the county's grand juries drawn since being on the bench (R. 50), and could recall only one Negro serving (R. 49), but could not recall whether he had ever charged a grand jury which included two or more Negroes (R. 50). Although Negroes composed 40 per cent of the total population (R. 54), he had never seen as many as four Negroes on a petit (trial) Jury (R. 55). Judge Carter testified that at one time there were very few Negroes on the Jury rolls of Montgomery County. "In fact we were not able to get them until the last year or two" (R. 25).

Presiding Judge Walter B. Jones, President of the Board of Jury Supervisors since 1933 (R. 65), said that among other methods used in selecting names of persons to serve as jurors, that they sometimes consulted voting lists, or they relied on personal acquaintance, and some names were sent to the Board through the mail (R. 68). Civic Clubs were contacted and asked for names but no social clubs (R. 69). However, names of Negroes were gotten by per-

sonally contacting "representative" colored people and asking them to make recommendations (R. 69), but he could not name one Negro on the jury roll (R. 70-71).[4]

John R. Matthews, Circuit Clerk for 20 years, a member, and the Clerk of the Board of Jury Supervisors, testified that names of Negroes were gotten for the jury roll and the jury box by contacting "reliable" Negroes in Montgomery, known to the Commission, and through personal acquaintances (R. 74). Although as Clerk he made up the jury roll he had "no idea" of the number of Negroes thereon (R. 74), but was sure that if he examined the jury roll, he could identify some of the names thereon as those of Negroes. On being requested to examine the jury roll, which was in court, by petitioner, for the purpose of pointing out any names thereon of persons known to him to be Negroes, he refused and was sustained by the court (R. 74-76). The court also refused to allow counsel for petitioner to examine the roll in order to ascertain the number of persons thereon (R. 76), and sustained the State's objection to petitioner's request of the witness to give the name of one Negro on the jury roll (R. 77). Petitioner objected to the court's several rulings on constitutional grounds (R. 77).

Mr. Matthews also testified that the venire of regular and special jurors drawn to try petitioner numbered 100 persons of whom 8 or 9 were Negroes (R. 77). He estimated 3000 names on the jury roll and had no idea what percentage of this number were Negroes (R. 80). He named five Negroes he had asked to submit names of prospective

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[4] "Q. Name one Negro you know on this jury roll.

Mr. Garrett: We object the court.

The Court: Objection overruled.

The Witness: If I had the jury roll I could probably go over it. We have some Negroes I see over here I wouldn't recall their names" (R. 71).

Negro jurors, two of whom probably submitted no list (R. 82-83). Some white persons were asked to submit names of Negro jurors, but no Negroes were asked for names of white persons (R. 89). Only Negroes contacted were personal acquaintances (R. 88), one of whom was known to have been convicted of felony (R. 88). Six lawyers testified with reference to service of Negroes on juries. Not one could remember more than 3 Negroes on any jury (R. 89-101).

Mr. John Blue Hill, a practicing lawyer in Montgomery County for 35 years, testified that he remembered seeing as many as 3 or 4 Negroes on jury panels in the last few years, but that he had never tried a case either civil or criminal where more than one Negro sat on the jury (R. 98).

Petitioner called as witnesses 18 Negro citizens of Montgomery County, property owners, and literate, some college trained and members of social and civic organizations. Three testified that they had been summoned on at least one occasion as members of a jury panel (R. 109, 145, 160), but not one had ever served on a jury (R. 106-173). One Negro, Winston Craig, who at the time was chauffeur for the Governor of Alabama, and had served the last 5 Governors in like capacity, had been a resident of Montgomery County for 17 years and testified that he had been summoned on one occasion and was the only Negro on the venire. He stated that he did not then serve, nor had he ever served as a juror (R. 109-110). Craig claimed a wide acquaintance among Negroes in Montgomery, and knew many of them by name and address (R. 110), but the court refused over petitioner's objections to allow him to examine the jury roll for the purpose of attempting to identify names of persons thereon known to him to be Negroes (R. 110-111).

Warren G. Brown, a Negro barber shop owner, testified that he had never been summoned to serve as a juror, and knew of no Negroes who had served as a juror in Montgomery County, Alabama, although he had a wide acquaintance among Negroes (R. 122-123). The Court refused to allow Brown to examine the jury roll for the purpose of attempting to identify any names thereon as those of Negroes (R. 123-124). The State called only one witness William F. Thetford, Circuit Solicitor since January, 1951, who testified that there had been few panels of petit jurors during his tenure which didn't include Negroes (R. 186), and that in 1954 of 18 grand jurors, 3 were Negroes (R. 186).

The Grand Jury which indicted petitioner contained no Negroes (R. 193); and the panel of regular and special jurors drawn to serve for the week of May 30, 1955 contained the names of 100 persons, 8 of whom he identified as Negroes (R. 202-203).

The trial Court's ruling denying petitioner's motion to quash the venire (R. 204-205) was sustained on appeal by the Alabama Supreme Court (R. 476).

E. *Refiling of Motion and Selection of Jury.*

Petitioner again requested permission of the court to withdraw his pleas, and refiled his motions to quash the indictment on constitutional grounds, and the court again denied the request and the motions (R. 207-210). The court then proceeded to qualify the regular and special jurors called to try this case. At the insistence of the state over petitioner's vehement objections each member of the panel was questioned relative to membership in the National Association for the Advancement of Colored People. The Solicitor stated as his reason for asking the question, in presence of all the prospective jurors, that he had heard

that the said Association was financing petitioner's defense (R. 210-211).[5] Counsel for petitioner immediately moved for a mistrial on grounds that the State had deliberately injected bias into the hearing, and to proceed under the circumstances would deprive petitioner of rights guaranteed him by the State and Federal Constitution (R. 211-212). This motion was overruled (R. 211), and the trial court sustained on appeal (R. 476-477).

After selection of the jury the court announced exclusion of all persons except members of the bar, counsel, officers of the court, law enforcement officers, the accused, his family and relatives, and "the parson of his church", members of the press including radio and news services. Petitioner's objection on Constitutional grounds, and his motion that the public be excluded only while prosecutrix testified, were overruled (R. 226-227), and the ruling was sustained by the Supreme Court of Alabama on appeal (R. 477).

III. Testimony at the Trial

A. *Commission of the Offense and Identification of the Accused.*

Prosecutrix testified that her assailant entered her home during the morning of July 28, 1952 (R. 229), compelled her to have intercourse (R. 231) and beat her unconscious (R. 232, 233). She identified her assailant in very general terms as a Negro seventeen to twenty-five years of age; taller than her husband who was about five feet nine and one-half inches tall (R. 237) without a mustache (R. 234).

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[5] "The Solicitor: The information we have . . . it may not be correct; I wouldn't say it is or isn't . . . this information came to me this case is being financed by the National Association for the Advancement of Colored People. I think it would be pertinent" (R. 210-211).

wearing dark blue or black shirt with yellow gold design and light blue trousers (R. 230). Petitioner's only resemblance to this general description is that he is a Negro. There is uncontradicted testimony that on June 30, 1952, when he was arrested by Montgomery police he was sixteen years of age and five feet six inches tall, of small build (R. 438); further, petitioner's father testified that he wore a mustache at the time of the alleged crime and had worn one since the age of fourteen (R. 444-445). After petitioner's arrest police searched his home and seized his clothing (R. 372), but on the trial the State failed to produce a single item similar to clothing described by prosecutrix.

B. *Inculpatory Statements and Confession: Testimony by Prosecutrix and Witness Clark.*

Prosecutrix identified petitioner on the trial as her assailant (R. 229); however, on cross examination it was brought out that he had read an unsigned statement then given her which she supposed defendant had made (R. 237)[6] and after observing him alone in a room through a "glass" (R. 235). Witness Clark testified that on the date of the alleged rape close to 12:30 P. M. he had picked up a Negro

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[6] "By Lawyer Hall:

Q. Let me ask you a little something further with reference to your alleged identification of this defendant in November. Were you told on that occasion that he had confessed before you looked at him?

A. I was given a written statement, but it wasn't signed.

Q. You were given a statement, or a statement allegedly made by this defendant?

A. I suppose so. It had his name on it, but it wasn't signed.

Q. It did have his name on it?

A. Yes.

Q. You were given that statement before you looked at him?

A. That is right.

Q. You had read that statement before you looked at him?

A. That is right . . . " (R. 266).

man trotting along Cleveland Avenue (R. 246), that he rode with him five or six blocks (R. 244). He testified that the man wore blue pants, a flowery colored sports shirt, and a straw hat (R. 244). He identified petitioner as the hitch hiker, after having a conversation with him at the Montgomery City Hall in 1952, but on the trial could not remember the month he had seen him in 1952 (R. 256).

Neither the written statement shown Mrs. Crowder nor the conversation between Clark and Petitioner, as such, were introduced by the State on the trial.

C. *Petitioner's Defense.*

Petitioner took the stand to deny that he committed the crime (R. 394-395), and to testify that he had been at home on the morning of the alleged rape until after noon (R. 393-394), that he had played checkers on that morning with a girl named Rebecca (R. 407), and that he remembered the day because on the afternoon of that day he had been picked up by the police and taken to jail where he was held without charge until nine or ten o'clock at night (R. 393-394). The testimony of Rebecca Mitchell, deceased, taken in 1952 on petitioner's first trial, was read into the record, to the effect that petitioner was at her house playing dominoes on the morning of the crime from eleven A. M. until four P. M. (R. 385-386).

ARGUMENT

I.

A.

Due process of law guaranteed by the Fourteenth Amendment to the United States Constitution was denied to petitioner, by refusal of the trial Court to re-indict and re-arraign petitioner, or allow him to withdraw pleas entered on arraignment in order to attack his indictment on constitutional grounds.

U. S. Constitution, Amendment 14;
Jeremiah Reeves, Jr. v. *State of Alabama,* 348 U.S. 891, 75 S.Ct. 214 U.S.C.A.;
Canty v. *Alabama,* 309 U.S. 629, 60 S.Ct. 612;
Vernon v. *Alabama,* 313 U.S. 547, 61 S.Ct. 1092;
Reece v. *State of Georgia,* 350 U.S. 76, 76 S.Ct. 167;
Chambers v. *State of Florida,* 309 U.S. 227;
Hill v. *State,* 20 Ala. App. 197, 101 So. 298;
Michel v. *Louisiana,* 100 L.Ed. 114, 76 S.Ct. 158;
Title 30, Sec. 86, 1940 Code of Alabama;
24 C.J.S., page 1128, Paragraph 1951.

Petitioner, at the outset, admits that under ordinary circumstances, the mere fact that a cause has been reversed on appeal would not necessitate re-indictment or re-arraignment. However, under the circumstances surrounding this case, it is impossible that petitioner could have had fair trial under Alabama practice and the Fourteenth Amendment to the United States Constitution unless he had been either re-indicted and re-arraigned, or allowed to withdraw pleas entered on the original arraignment in

1952, in order that he might attack his indictment on constitutional grounds.[7]

Petitioner's motion to quash the indictment made before the jury was qualified and sworn, went to the legality of the evidence before the grand jury at the time the indictment was returned against him, and alleged that the sole basis of the indictment returned against him on November 14, 1952, was an alleged confession which was obtained from him through coercion, violence and threats of violence (Def. Ex. 6, R. 208-210). There is no evidence in the record as to what was before the grand jury, or who testified before the grand jury, but the only testimony connecting petitioner with the offense was that given by Mrs. Crowder and the witness Clark (R. 229, 256). Assuming that the prosecutrix testified before the grand jury on November 14, 1952, after she had visited the city jail for the purpose of identifying defendant. Her testimony on the trial shows conclusively that on November 12, 1952, before she had seen defendant and allegedly identified him, she had been given a statement which she supposed was made by defendant (R. 237).

"By Lawyer Hall:

Q. Let me ask you a little something further with reference to your alleged identification of this defendant in November. Were you told on that occasion he had confessed before you looked at him?

A. I was given a written statement, but it wasn't signed.

Q. You were given a statement allegedly made by this defendant?

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[7] Alabama statutes require that an indictment may be attacked only by pleas in abatement which must be made before pleading to the merits on arraignment (R. 526-527). Section 278, 279, Title 15, 1940 Code of Alabama; Section 286, Title 15, 1940 Code of Alabama.

A. I suppose so. It had his name on it, but it wasn't signed.

Q. It did have his name on it?

A. Yes.

Q. You were given that statement before you looked at him?

A. That is right."

In light of her original general and vague description of her assailant, it is reasonable to assume that her identification is based, in large measure, on the "statement", and this identification and the statement, or the essence of the statement was given to the grand jury. Further, under the facts produced on this trial it is reasonable to infer that the indictment in this cause was founded solely on the identification which was based on the aforesaid statement, plus testimony of the witness Clark.

On this trial the State did not introduce any confession or inculpatory statements into evidence; however, petitioner contends that he was caused through fear, coercion, violence, threats of violence to make such statements and it is his contention that such confession or statements were shown to the prosecutrix before she identified him on November 12, 1952, and in turn to the grand jury before the indictment was returned on November 14, 1952, and that such use of the confession or statements which have been ruled out of this cause by this Court violates his constitutional rights to due process and equal protection of law just as much as if they had been introduced on the trial and gone to the jury.

It is petitioner's further contention that the trial court was put in fatal error when it refused to allow him to attempt to prove the allegations of his motion which were, to the effect, that the only evidence before the grand jury

which indicted him was illegal, and that the said indictment was therefore void.[8] The Alabama Supreme Court erred when it affirmed. There is no testimony in the record to the effect that any witnesses testified before the grand jury or that it had any other type of proof before it at the time the indictment was returned, and it is reasonable to assume that defendant may have been able to prove the grounds of his motion. Anyway, on a trial for his life he should have had the chance, if the guarantees of our law are to have any meaning.

U.S.C.A. Constitution, Amendment 14;
Title 30, Sec. 86, 1940 Code of Alabama.

It is suggested further that after a review of his prior conviction on certiorari, this Honorable Court in the case of *Jeremiah Reeves, Jr.* v. *State of Alabama,* 75 S.Ct. 214, the judgment of the Supreme Court of Alabama was reversed unconditionally, and that all the proceedings on the former trial were nullified by the said decree, and petitioner was entitled to be discharged, and that in order to try him again he should have been re-indicted and re-arraigned.

24 C.J.S., page 1128, Paragraph 1951, and cases cited.

The trial Court took official notice of the fact that petitioner had been indicted by the Grand Jury of Montgomery County on the 14th day of November 1952 and arraigned

[8] In *Hill v. State,* 20 Ala. App. 197, 101 So. 298 which was an appeal of a conviction of violation of liquor laws, before pleading the defendant made a motion to quash the indictment, "because there was no legal evidence against the defendant in this case before the grand jury which found the indictment on which he was to be tried," the Alabama Supreme Court held that this motion presented an issue of fact to be determined by the trial court before the defendant could be required to plead on the merits.

on November 15, 1952 (R. 207-208). It was pointed out to the Court that petitioner's present counsel were not the same attorneys who represented him on the previous trial (R. 38). A written motion properly verified, was filed, before the jury was sworn, requesting the Court's permission to withdraw pleas previously entered on petitioner's arraignment in 1952 in order that he might file motions testing the legality of the aforesaid indictment (Def. Ex. 1, R. 4, 39).

The State objected to the motion on the authority of Section 286 of Title I of the 1940 Code of Alabama which requires pleas attacking the formation of grand juries to be filed before arraignment and the trial court overruled the motion (R. 39) and was sustained on appeal by the State Supreme Court (R. 470, 471). The Supreme Court of Alabama in ruling on this point cited with approval the recent decision of this Honorable Court in *Michel* v. *Louisiana*, 100 L.Ed. 114, 76 S.Ct. 158, refusing to reverse the Louisiana Court, and holding that John Michel had waived the right to attack his indictment on grounds of systematic exclusion of Negroes from service on the grand jury, because of race or color, in that he had not exercised his right to do so within the time required by the Louisiana Statute (R. 471-472). Mr. Justice Clark for the court held in the *Michel* case "We do not find that this requirement on its face raises an insuperable barrier to one making claim to federal rights. The test is whether the defendant has had 'a reasonable opportunity to have the issue as to the claimed right heard and determined by the Court' . . ." In *Michel* the defendant had had three days at least, after he had secured competent counsel, within which to act. Petitioner here was indicted November 14, 1952 (R. 1), and arraigned on November 15, 1952 when his then counsel asked for a continuance which was refused (R. 1-2). There

can be no doubt, that conviction under the facts of this case cannot survive the test set out in *Michel*. Under no interpretation of the facts can it be said that petitioner "had a reasonable opportunity to have the issue as to the claimed right heard and determined" by the State County.

In *Reece* v. *Georgia*, 350 U.S. 76, 76 S.Ct. 167, which was decided during the same term and at the same time as *Michel*, the same question was presented. Defendant had been prevented from attacking his indictment by a procedural statute of Georgia. This Honorable Court reversed the Georgia Court—holding that *under the circumstances* (emphasis ours) the application of the Georgia rule of practice to the accused, a semi-literate Negro, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. An appraisal of the facts in this case indicates clearly that the rule set out in *Michel*, and applied in *Reece*, is controlling, and that petitioner was denied his constitutional rights.

Assuming for the purpose of argument that the previous indictment and arraignment of petitioner was sufficient to support his second trial, where, as in this case, it is shown that only some part of one day elapsed between petitioner's indictment and arraignment and that he had been held incommunicado without advice of counsel until after his indictment and that his then counsel had unsuccessfully sought more time before pleading (R. 2), and serious question is proposed on the trial going to the legality of the aforesaid indictment. It is an abuse of discretion for the Court to refuse petitioner that chance to test the legality of the said indictment. Indictment for felony is serious indeed, and where the offense charged is a capital crime and the accused may lose his life he should not be deprived of any safeguard for individual rights, especially where such deprivation is based on a matter of procedure except

that it appears to the court that the grounds advanced to support such rights are unreasonable or capricious. Especially is this true where there is a paucity of convincing evidence.

Petitioner also offered a motion to quash which alleged arbitrary exclusion of Negroes from the grand jury which indicted him, and from grand jury service in Montgomery County, solely because of their race or color in violation of his constitutional rights (Def. Ex. 2, R. 5, 42)—which the trial court denied without a hearing (R. 43). The Circuit Solicitor who presented evidence to the grand jury which indicted the defendant testified that although some Negroes had served on one half of the grand juries organized during his tenure of office that in his best judgment there were no Negroes on the grand jury which indicted petitioner (R. 193). Other testimony in the record indicates that defendant would have been able to prove his motion if given the chance by the trial court, and under our law he should have had that chance.

II.

The Conclusion of the Supreme Court of Alabama that petitioner failed to prove systematic exclusion of Negroes from jury service solely because of race or color is incorrect.

Patton v. *State of Mississippi*, 332 U.S. 463;
U. S. Constitution, Fourteenth Amendment;
Title 18 U.S.C., Sec. 243;
Cassell v. *Texas*, 339 U.S. 463;
Avery v. *Georgia*, 345 U.S. 559, 73 S.Ct. 891;
Williams v. *Georgia*, 349 U.S. 375, 75 S.Ct. 814;
Hernandez v. *Texas*, 347 U.S. 475, 74 S.Ct. 667.

The State used a system of jury selection which had to result in systematic exclusion of Negroes from juries, and which, in fact, resulted in such exclusion contrary to the Fourteenth Amendment of the United States Constitution and Title 18 U.S.C., Sec. 243.

The Alabama statute which sets the qualifications of jurors, requires, with a few exceptions, that jurors shall be "male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment . . . " (R. 178-177). It further directs that the commission clerk who "is charged with the duty of seeing" that the names of all qualified persons are placed in the jury box, "scan the registration lists, the lists returned to the tax assessor, any city directories, telephone directories, and any and every other source of information from which he may obtain information . . . " (30 Code of Ala. Sec. 24 (1940).) (R. 177-178). However, the jury commissioners for the most part limited names in the box to persons whom they knew personally or to persons whose names they had obtained from individuals or organizations with whom they were personally acquainted (R. 47, 73, 82, 83).

As Mr. Justice Reed pointed out in *Cassell* v. *Texas*, 339 U.S. 282, 288, one might expect that in a community like Montgomery the opportunity for which jury commissioners to have personal acquaintanceship with Negroes is limited. Although they testified that they made efforts to obtain names of "high class" or "good" Negroes (R. 82-84), their success does not appear to be much better than that discussed in *Hill* v. *Texas*, 316 U.S. 400, 402, or *Cassell* v. *Texas*, 339 U.S. 282, 288, fn. 23, where avowedly diligent, but unsuccessful efforts to obtain Negroes on a personal basis did not avoid condemnation by this Court.

The Board of Jury Supervisors is composed of the two circuit judges, the Probate Judge, the Sheriff and the Circuit Court Clerk (R. 66). Judge Eugene Carter (R. 44-65), Judge Walter B. Jones (R. 65-72), Circuit Clerk John R. Matthews (R. 72-89) and several other witnesses all testified that Negroes were not discriminated against.[9] However, the smallness of the number mentioned as having served at any one time, in view of the percentage of Negroes in the County, indicates discrimination. After testimony indicating a wide acquaintance with Negroes, Defendant asked the Clerk of the Board to examine the jury roll and identify as many Negroes as he could. He refused and the Court refused to require him to examine the roll (R. 75-76). Counsel for defendant requested permission of the Court to count the names on the jury roll, and the Court refused such permission (R. 76). The Clerk of the Jury Commission was asked to give the name of one Negro on the roll but the court sustained the State's objection to this request (R. 77). Winston Craig, a Negro resident of Montgomery County for seventeen (17) years testified that he had a wide acquaintance among Negroes living in the County (R. 110), but was not allowed, at the suggestion of the defendant's counsel, to examine the jury roll for the purpose of ascertaining the number of names of Negroes, if any, he could identify therein (R. 110-111).

Warren H. Brown, another Negro witness, a barber shop proprietor, with a large acquaintance among Negroes in the County was not allowed to examine the jury roll for the purpose of identifying any names thereon as those of Negroes (R. 123-124).

Eighteen Negroes, all possessing the qualifications and none of the disqualifications under the Statute, testified that

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[9] Mere assertion by public officials that there has been no discrimination will not suffice. *Hernandez* v. *State of Texas*, 347 U.S. 475, 74 S.Ct. 667.

they had never served on a jury in Montgomery County although three (3) had been summoned as veniremen and collectively knew very few Negroes who had (R. 106-173).

Although the same set of facts do not appear here as in *Williams* v. *Georgia*, 349 U.S. 375, 75 S.Ct. 814, or *Cassell* v. *Texas*, 339 U.S. 463, the irregular method of jury selection used by the members of the Board of Jury Supervisors, and particularly as applied to selection of Negroes (R. 47, 74) brings this case squarely within the rule of those cases. Considering the fact that testimony showed that very few Negroes had served on juries in the past, and in view of the testimony of one of the Supervisors, Circuit Judge Eugene W. Carter who had organized most of the Grand Juries in his twenty-one (21) year tenure, that he remembered one time when Negroes on juries were few, "In fact we were not able to get them until the last year or two" (R. 55), we must suppose that the number of them now on venire was more than usual. Of the one hundred (100) persons making up the panel, the Circuit Solicitor who prosecuted this cause identified only eight (8) as Negroes (R. 202), none of whom served on the trial jury (R. 225). This in a county where Negroes made up approximately 40% of the total population renders the method of jury selection suspect.

Consideration of the testimony and evidence adduced on the hearing, plus the refusal of the trial court to permit petitioner to examine the jury roll for the purpose of ascertaining the number of persons enrolled, and the number of Negroes on the roll, if any, substantiated the allegations of defendant's motion to quash venire.

III.

By upholding the trial court's denial of a public trial and refusal to declare a mistrial after the State prosecutor had made prejudicial statements in the presence of the venire from which the jury was selected, the court below denied petitioner his constitutional rights to a fair and impartial trial, and is in probable conflict with decisions of this Court.

50 C.J.S. pages 976-977 paragraph 209;
In Re Oliver, 68 S.Ct. 499, 333 U.S. 257.

When the Court was about to qualify the jury, it asked for suggestions from counsel (R. 210).

The Solicitor who prosecuted for the State answered, in the presence of the entire panel:

> "The Solicitor: I would like each member of the jury panel qualified as to whether they are, or not, a member of the National Association for the Advancement of Colored People" (R. 210).

Counsel for petitioner objected on grounds that such a question was not pertinent or proper on qualification (R. 210-211) and on further grounds that reference to the National Association for the Advancement of Colored People was made by the State to misdirect issues and prejudice the minds of the jurors (R. 211).

Thereupon, in answer to the Court's question:

> "The Court: Do you wish to reply to that?
> The Solicitor: The information we have . . . it may or may not be correct. I would not say it is or is not this information came to me this case is being financed by the National Association for the Advancement of Colored People. I think it would be pertinent" (R. 211).

The Court overruled defendant's objections (R. 211) and defendant then moved for a mistrial on grounds that " . . . the Solicitor of Montgomery County, Alabama deliberately injected into this cause an issue calculated to bias or prejudice the minds of the jurors, who are all present and heard what the Solicitor said and the discussion about it" (R. 211).

Defendant's motion was refused and he was granted an exception based on denial of rights guaranteed him by the United States Constitution (R. 211) which ruling was sustained by the Alabama Supreme Court (R. 476-477). Defendant insists that the Court exceeded its discretion in qualifying the jury. Conceding that the Court should ascertain the extent of the prospective juror's financial interest in the trial by proper questioning, it is defendant's contention that this could have been done very easily by simply asking whether or not any one of the prospective jurors had contributed to the accused's defense fund. The assertion by the State that N.A.A.C.P. was financing petitioner's defense was a death blow to an impartial hearing before this jury of all white Southerners. It is defendant's further contention that the State's suggestion of interest on the part of the National Association for the Advancement of Colored People, made in the presence of the jury, was unnecessary and uncalled for and was made solely for the purpose of prejudicing the jury against the defendant and his counsel.

Although mere suggestion of interest in the case by the N.A.A.C.P. was like waving a red flag before a bull, mere membership on the part of any juror could not have, in itself, been a reason for the Court to disqualify him, or for the State to challenge for cause. It would have been necessary for further proof to prove prejudicial interest.

The trial Court's exclusion of the general public was a violation of defendant's rights under the United States Constitution. Especially was this true during that portion of

the trial when the prosecutrix was not testifying. While the Court excused certain persons from its ban, the general public was excluded. Among them were defendant's friends, whose presence may have made a difference in the outcome of this trial, in that testimony on the trial may have awakened some memory in some one or more of them, which may have been invaluable to petitioner in proving his alibi.

The right to a public trial, explicitly set forth in the Sixth Amendment and in corresponding provisions of almost every state constitution is one of the most ancient and deep-rooted rights of an accused in our legal tradition. It has variously been attributed to immemorial common law usage, historical accident, aversion to Star Chamber proceedings, and reaction to the procedures of the Inquisition, but whatever its origin, the right is so widely and uniformly recognized that it may fairly be described as fundamental. Throughout the English-speaking world it is not disputed that a trial must be public. It is thus apparent that the right to a public trial is "implicit in the concept of ordered liberty" which is due process of law, *Palko* v. *Connecticut*, 302 U.S. 319, 325. Indeed, this Court expressed its own concurrence in the sanctity of the public trial as an aspect of due process *In Re Oliver*, 333 U.S. 257, 273, where this Court noted "this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public . . . "

CONCLUSION

Petitioner has set forth in his argument a number of reasons why the judgment below should be reversed by this Court: The failure of the State to re-indict and re-arraign petitioner before trial; refusal to allow him to withdraw pleas previously entered on arraignment in order that he might attack his indictment on constitutional grounds; systematic exclusion of Negroes from juries, improper and prejudicial remarks in qualifying the jury, and refusal to give him a public trial.

As in all cases where a number of errors occur these could not but have a cumulative effect.

Therefore, because of the denial of each of the constitutional rights complained of in this brief and because of their cumulative effect petitioner submits that the judgment below should be reversed.

Respectfully submitted,

PETER A. HALL
ORZELL BILLINGSLEY, JR.
Counsel for Petitioner